United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1907.

No. 1727.

HUGH HARTEN, APPELLANT,

vs.

ERNST LOFFLER.

461

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JANUARY 12, 1907.

In the Court of Appeals of the District of Columbia.

No. 1727.

HUGH HARTEN, Appellant,

v.

ERNST LOFFLER.

For the correction of certain clerical or typographical errors in the transcript of record herein filed September 27, 1906, the parties to this cause, by their respective attorneys, hereby stipulate and agree that the said transcript be amended as follows:

(1.) Near bottom of page 14, in the sentence, "that a line adjoins," etc., insert *lane* in lieu of *line*.

(2.) Near middle of page 29, in the question, "Can you recollect that you said," etc., insert *what* in lieu of *that*.

(3.) On page 100, two portions of charge excepted to and enclosed within parentheses, substitute brackets [ ] for parentheses ( ).

LORENZO A. BAILEY,
Attorney for Appellant.

LEON TOBRINER,
Attorney for Appellee.

[Endorsed:] No. 1727. Hugh Harten, appellant, *v.* Ernst Löffler. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Jan. 12, 1907. Henry W. Hodges, clerk.

No. 1727

HUGH HARTEN, Appellant,

vs.

ERNST LOFFLER.

BRIEF FOR APPELLANT.

LORENZO A. BAILEY,

For the Appellant.

[illegible] Printing
City of Washington.

In the Court of Appeals of the District of Columbia.

HUGH HARTEN, *Appellant*,
vs.
ERNST LOFFLER.

No. 1727.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from the final judgment of the Supreme Court of the District of Columbia, entered upon the verdict of a jury, in favor of the plaintiff, in a suit at law to recover damages for an alleged breach of contract.

The contract (R., 11) is as follows:

"April 27, 1905.

"For and in consideration of the sum of Twelve thousand dollars two hundred and fifty dollars whereof is hereby acknowledged I hereby agree to sell to Ernst Loffler the property, good will, license and fixtures, located on Brightwood Avenue near Battle Ground Cemetery, fronting on Brightwood Avenue about 60 feet with a depth of about two hundred feet, title and transfer of license guaranteed or deposit refunded. I agree to use my best efforts to secure the signers for the transfer of said license and to give said Loffler a clear title to all of above property.

"HUGH HARTEN.
"JULIA HARTEN."

The declaration (R., 1–4) contains three counts, in each of which it is alleged that the defendant, on April 27, 1905,

agreed in writing to sell to the plaintiff, for $12,000, a certain tract of land, situate in said District, together with the good will, license and fixtures of the saloon business conducted by the defendant on said land, all which was owned by the defendant; that the plaintiff then paid him $250 on account and afterward tendered him the remainder of said $12,000, but the defendant refuses to make conveyance in accordance with the agreement. The second and third counts differ from the first by the addition of averments that the plaintiff has lost the use and profits, etc. The third count differs from the others by the addition of averments that the plaintiff presented for execution a properly prepared conveyance, etc.

The declaration states generally the location of said tract of land as situate on "Brightwood Avenue, near Battleground Cemetery, in the District of Columbia," but wholly omits any statement of its area, or other description.

To each count, the defendant pleaded the general issue and also a plea of set-off (R., 4, 5). In the latter plea he states the location of the tract owned by him as in the declaration; that the entire tract has a width of about 85 feet at the front on said Avenue and a depth of about 235 feet from front to rear; that the southern 60 feet at said front by a depth of 200 feet is improved by buildings in which he carries on his bar-room business and which contain fixtures used in the business; that the plaintiff, on April 27, 1905, agreed with him in writing to purchase from him for $12,000 the said southern 60 feet by 200 feet, together with the said license and fixtures and the good will of said business, and then paid $250 on account, but refuses to pay the remainder of said $12,000 although thereunto requested and although the defendant has duly offered, etc., to perform his part of the agreement.

The plaintiff joined issue upon the first plea, and to the second plea replied not indebted and *non assumpsit*, upon

which replications the defendant joined issue and upon these issues the case was tried. The jury awarded the plaintiff $1,250 with interest on $250 thereof from April 27, 1905, and from the judgment entered on such verdict the defendant appeals.

Prior to the institution of the suit the plaintiff caused to be prepared a deed, to be executed by the defendant and his wife, conveying to the plaintiff the entire tract together with the good will, bar fixtures and saloon license. He requested the defendant to execute the deed and at the same time offered to pay the defendant the balance of the purchase money. The defendant refused to execute the deed, but offered to convey to the plaintiff the south 60 feet front by 200 feet in depth of said tract, together with the good will, fixtures and license claimed by the plaintiff, but this offer was refused by the plaintiff, who demanded the entire tract.

The questions involved and stated in the assignment of errors are raised by exceptions noted during the trial and set forth in the bill of exceptions which forms part of the record.

The main question is whether or not the court erred in admitting parol testimony, offered by the plaintiff, for the purpose of proving that the words "about 60 feet" and "about 200 feet" were inserted in the contract as the result of an erroneous estimate, by the parties, of the dimensions of the entire tract of land owned by the defendant, and that when the defendant signed the contract it was understood and intended by him and by the plaintiff to include the entire tract (R., 54, 55).

Another question is as to the sufficiency of the evidence to prove that the fair market value of the license and property claimed by the plaintiff to be included in the contract ever exceeded $12,000 or that the plaintiff sustained any damages.

The principal uncontroverted facts established at the trial are as follows:

On April 27, 1905, and prior thereto, the defendant Harten was the owner of a tract of land occupied by him situate in the District of Columbia, on the west side of Brightwood Avenue near Battle-ground Cemetery, beginning on the line of said Avenue at the corner of a lane and running thence southerly along the line of said Avenue eighty-five (85) feet, thence westerly two hundred and twenty-four (224) feet to said lane, thence northeasterly along said lane two hundred and thirty-nine (239) feet and six (6) inches to the place of beginning, being the same property deeded to him in June, 1897, and containing ninety-five hundred and twenty (9,520) square feet and improved by several buildings. The south line of the tract with the line of said Avenue form a right angle. The main building has a front of 51½ feet on said Avenue, leaving unoccupied of said tract, north of said building, a triangular piece of land fronting 13½ feet on said Avenue, and south of said building a strip fronting 20 feet on said Avenue and used as a driveway, having over it at the entrance from said Avenue a sign with the words "Summer Garden," in large letters (R., 8, 9). The southern part of the building is known as the old part, and the northern part is known as the new part. On the ground floor a hallway, entered by a door at the front of the building, is between the old part and the new part. South of the hall is a little sitting room, and south of that is the bar-room, which occupies the southeast corner of the building, where the bar-room business (also called "saloon" business) was conducted before and since the new part was built (R., 17). It has been a bar-room for forty or fifty years. After cutting off the south 60 feet by about 200 feet the remainder of the tract would be of practical value to the defendant. As soon as 13th, 14th or 16th Street is extended that far

out, the lane on the north side will fall into the defendant's property (R., 42). North of the hallway on the ground floor is a large storeroom with a door opening upon Brightwood Avenue and containing a stairway leading to the upper story of the new part of the building, the upper story whereof can thus be entered from the front without passing through or using the hallway (R., 48, 40, 43). For seven or eight years last past the defendant and his wife have occupied said tract of land as their home, and he has conducted the bar-room business in the old bar-room. He has been connected with the bar-room business for more than forty years (R., 39). In April, 1905, the plaintiff was and had been for about seventeen years in the same business, and had frequently been in the defendant's place of business (R., 15), and, according to his own testimony, knew as much about the amount of the receipts in that place of business as the defendant did (R., 18).

On April 27, 1905, the plaintiff, accompanied by Mr. Richard, went to the defendant's place of business, and the agreement in question was then and there written by Richard at the request of the plaintiff. Richard went there with the plaintiff for that purpose (R., 19, 22, 23) and had previously signed a deed containing a description of the property and had been interested in the property under other deeds in which it was described (R., 23, 8). The bar-room license and business was the principal thing that the plaintiff was after (R., 17). While Richard was writing the agreement in the little sitting room, the defendant, who had no bartender, was part of the time in the bar-room waiting on customers and did not hear all or half of the conversation that was being conducted in the sitting room (R., 45, 43, 23). After the agreement was written it was handed to the defendant, who read it over and signed it. He was then called into the bar-room, and his wife was then brought in by Richard and thereupon she signed it

(R., 45, 46). The plaintiff then paid to the defendant the sum of $250 mentioned in the agreement (R., 18) and thereupon the plaintiff and Richard departed (R., 23), taking the agreement with them.

The same day, before dark and within two or three hours after the agreement was signed, the defendant, in the presence of Donaldson and Brian, with a tape line measured off sixty feet of the front of the property, commencing at the southeast corner of the tract, and found it ended at the hall door or about the north side of the hall door (R., 44, 40, 36, 35).

Due effort was made to obtain the requisite consent, as required by law, of certain property owners, to the transfer of the license to the plaintiff, but Mr. Orme, the defendant's next-door neighbor, whose signature was necessary for such transfer, refused to sign (R., 29, 21). Thereafter, early in May, 1905, the plaintiff, accompanied by his attorney, Mr. Ray, and Andrew Loffler, visited the defendant and requested him to sign the application for transfer of the license and also to endorse his current license to the plaintiff, but the defendant refused to do so, saying, "You have not enough signers" (R., 14, 28, 29). The defendant also then stated that his wife could not get Orme to sign; that Orme refused (R., 29). Thereafter, on May 16, 1905, the plaintiff and his attorney again visited the defendant, taking with them a deed which they then requested him to execute, at the same time informing him that they had with them the purchase money and were prepared to pay him and close the deal, but he again stated that they did not have enough signers on the application for transfer of the license, and refused to sign the deed (R., 28). Thereafter the plaintiff's attorney wrote at the bottom of the agreement and the plaintiff signed (R., 16, 17) the following:

"I hereby agree to accept the above contract and will

purchase the property on the same terms and conditions. ERNST LOFFLER."

The deed above mentioned, which the defendant so refused to sign, was drawn to convey to the plaintiff, in fee simple, the whole of the defendant's said tract of land; "also, good will, bar fixtures and saloon license" etc., with covenants of special warranty and further assurance (R., 28, 29).

Thereafter, Mr. Bailey, attorney for the defendant, visited Mr. Ray, attorney for the plaintiff, and examined the deed and agreement which were in Mr. Ray's possession and obtained from Mr. Ray a copy of the agreement. Later Mr. Ray visited Mr. Bailey, who then stated that he had looked into the matter and considered the agreement to be too indefinite to be enforced by a suit for specific performance or by an action for damages. He also informed Mr. Ray that the defendant was willing to convey what the agreement called for, 60 feet by 200 feet. A few days later the following correspondence was had by the parties through their respective attorneys (R., 48, 49, 29, 27).

On May 23, 1905, the defendant sent to the plaintiff a letter enclosing a check for $250, and stating that the same was sent for the purpose of returning the amount of the deposit and requesting the cancellation of the contract. On May 24, 1905, the plaintiff returned the check with a letter insisting upon the execution of the deed. On May 25, 1905, the defendant, by letter, informed the plaintiff that the defendant and his wife refused to execute the deed because it "is not in accordance with the contract."

At the trial, the plaintiff in his testimony stated that the defendant's stock in trade was not intended by the parties to be included in the agreement (R., 16), and that if the defendant's receipts would average about $150 a week it would not be a profitable business and there would be no value to the business (R., 18).

A book kept by the defendant and read in evidence showed an average of $148.41 per week for gross receipts, during the years 1902, 1903, 1904 and 1905 (R., 47, 48).

The actual selling, or purchasing, value of the entire tract, without the improvements, was $2,380, and of the improvements $2,000 (R., 31). The value has not appreciated any since 1898 (R., 32), when the defendant bought the entire property for $6,000 (R., 23). The fixtures were of no cash value (R., 33).

The agreement was treated by the parties as indivisible.

ASSIGNMENT OF ERRORS.

The Court below, at the trial, erred to the prejudice of the defendant, as follows:

I. In admitting in evidence, over the defendant's objections, the following parol testimony tending to establish an unwritten agreement between the parties for the sale of land, and offered by the plaintiff for that purpose and for the further purpose of contradicting and altering the terms of the written agreement between them, viz:

(1) Parol testimony that two weeks or a month before the defendant signed the agreement of April 27, 1905, he told the witness Hood that he wanted to sell everything and get out of the neighborhood (R., 9, 10).

(2) Parol testimony that the defendant, prior to signing said agreement, in conversations with the plaintiff and others, indicated a desire on his part to sell the entire tract (R., 9, *et seq.*).

(3) Any and all parol testimony offered by the plaintiff in reference to said written agreement (R., 12).

(4) Parol testimony tending to prove that when the agreement was being written the defendant stated about 60 feet front by about 200 feet deep as the dimensions of the entire tract (R., 12).

(5) Parol testimony tending to prove that after signing

the agreement the defendant showed the plaintiff and the plaintiff's wife over the entire property (R., 13).

(6) The testimony of the plaintiff that prior to signing the agreement the defendant did not say to the plaintiff that he expected to keep a portion of the property for himself (R., 19).

(7) Parol testimony tending to prove that the parties to said agreement, at the time it was signed, intended it to include the entire tract in question (R., 9, 10, 12, 13, 19).

II. In admitting in evidence, over the defendant's objections (R., 14, 21, 22), and also in refusing to strike out on the defendant's motion (R., 21, 22), parol testimony tending to prove representations by the defendant to the plaintiff as to the amount of the receipts from the business, and particularly tending to prove that before signing the agreement the defendant informed the plaintiff that the amount of business he was doing there was $75 a day, and some Saturdays $125 (R., 14, 21, 22).

III. In admitting in evidence, over the defendant's objections, testimony that the plaintiff sold out a profitable business in the expectation of getting the defendant's business and relying on his agreement with the defendant (R., 14, 15).

IV. In admitting in evidence, over the defendant's objections, the testimony of the plaintiff as to the value of the business, leaving out the real estate (R., 15), and as to the fair rental of the defendant's property (R., 16).

V. In admitting in evidence, over the defendant's objections, testimony as to the value of the property and also as to the rental value of the property, all based upon the hypothesis that the proceeds of the business amounted to $75 a day, and $125 on Saturdays (R., 25, 26).

VI. In admitting in evidence, over the defendant's objections, the said written agreement when offered by the plaintiff (R., 11).

VII. In admitting in evidence, over the defendant's objections, the deed which the plaintiff requested the defendant to execute (R., 28, 29).

VIII. In refusing, upon the motion of the defendant by his attorney, to strike out testimony, as follows:

In the answer of the plaintiff, as a witness, to the question asked him upon cross-examination by the defendant's attorney, "Can you recollect what you said, if anything, to Harten?" so much of the answer as purports to state what Harten said to the witness (R., 16).

IX. In excluding the following testimony offered by the defendant and refusing to admit the same in evidence:

(1) Testimony tending to prove that the defendant, before the negotiations between him and the plaintiff had commenced, had placed a price of $12,000 upon the business, fixtures, good will and license and the old business portion of the property, reserving to himself the north end, and that the defendant, until and at the time of signing the agreement of April 27, 1905, was engaged in negotiations with the witness Brady upon those terms and reservations (R., 30, 35, 43).

(2) Testimony of the witness Montague as to what was a fair price to pay for the land, improvements, license and fixtures, assuming the land and improvements to be worth about $4,000 and the receipts from the business to be $150 to $200 a week (R., 32).

(3) Testimony tending to prove that before and at the time of signing the agreement the defendant's understanding with his wife provided for a reservation, by him, of the northern portion of said tract (R., 38).

(4) Testimony of the defendant as to whether or not anything was said, at the time he signed the agreement, to indicate that the plaintiff understood the agreement to include the entire tract, if that was his understanding (R., 40).

(5) Testimony tending to prove that the south 60 feet

front by 200 feet in depth of said tract was sufficient to carry on the said bar-room business (R., 40, 41).

X. In refusing, upon the motion of the defendant by his attorney, at and after the close of all the testimony, to instruct the jury to return a verdict for the defendant (R. 51), and also in refusing to instruct the jury as requested by the defendant in the instructions numbered II, III, VI, IX, X, XI, XIV and XV, respectively (R., 51, 52).

XI. In granting the 1st, 2d, 3d and 4th instructions, respectively, requested by the plaintiff, and in charging the jury accordingly (R., 54–56).

XII. In charging the jury as set forth in the several portions of the charge enclosed in brackets. (R., 53–60.)

POINTS AND AUTHORITIES.

The questions involved will now be considered in the order of their presentation in the foregoing assignment of errors, which are based upon exceptions duly noted and set forth in the record.

I. ADMISSION OF PAROL TESTIMONY.

The code, D. C., Sec. 1,117, requires an agreement for the sale of land to be in writing and signed by the party to be charged. This excludes oral evidence of such an agreement in whole or in part. "An agreement to be within the Statute of Frauds cannot be partly in writing and partly in parol."

11 G. & J., 314, 322, Moale *v.* Buchanan.

The original Statute of Frauds, 29 Car., II, Ch. 3, was enacted for the declared purpose of the "Prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury."

Alex., Br. Stat., 508.

The common law rule for excluding oral evidence as to written contracts rests upon the presumption that the parties waived all stipulations not put in the writing. But under the Statute of Frauds the oral evidence is rejected because it is the policy of the law to regard it as untrustworthy *per se.*

1 Reed, St. Fr., Secs. 12, 15.

The difference between the two rules is shown by the case of a written contract, on its face manifestly incomplete. If the subject matter of the contract is within the Statute of Frauds, no oral evidence can be received to supply the defects of the writing; whereas the common law rule is no bar to such admission.

Id., Sec. 12, citing many authorities.

In one of the cases cited by Reed, *supra*, a deed failed to include 17 acres which the defendant had agreed to sell to the plaintiff. Upon a bill for conveyance of the 17 acres, the Court said: "It makes no difference whether the want of a writing was accidental or intentional, by way of refusal or by reason of mutual mistake; nor that there were false representations and a pretence of conveying the land, but a fraudulent evasion." * * * "From the oral agreement there can be derived no legal right, either to have performance of its stipulations or written evidence of its terms." * * * "When the omitted term or obligation is within the Statute of Frauds, there is no valid agreement which the court is authorized to enforce, outside of the writing. In such case, relief may be had against the enforcement of the contract as written." * * * "But rectification by making the contract include obligations or subject matter to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the Statute of Frauds as if there were no writ-

ing at all." * * * "In Parkhurst *v.* Van Cortlandt, 14 Johns., 15, 32, it is said that 'where it is necessary to make out a contract in writing, no parol evidence can be admitted to supply any defects in the writing.'" The court also cites 11 G. & J., 314, *supra*, 19 Conn., 63, and other cases. As to reformation, the court said, "The difficulty is, that, if the fraud vitiates and defeats the instrument, then the modified agreement to be enforced must be that which is proved by parol evidence; and this seems to violate the Statute." * * * "When it is sought to extend that power to interests in land not included in the instrument, and in relation to which there is no agreement in writing, the case stands differently. Fraud may vitiate the writing which is tainted by it; but it does not supply that which the statute requires." * * * "In the absence of a legal contract by the agreement of the parties, it will not establish one, nor authorize the court to declare one, by its decree."

102 Mass., 24, 30, 34, 35, 37, Glass *v.* Hulbert.

Balto. Per. Bldg. & Land Society *v.* Smith, 54 Md., 187, was a suit by the vendee for damages for breach of contract for sale of land, said to comprise "about 65 acres." The tract was found to contain only 36 acres, and the purchaser refused to accept a deed for that amount or anything less than 65 acres. Parol evidence as to representations made by the vendor's agent as to the quantity of land was held inadmissible (199). The Court said, "In such case the appellee (vendee) must stand or fall upon the terms of the written paper, and it is not competent for him to set up by parol another and different contract from that on which he has declared," * * * "and this objection applies with special force in a case like the present, where the contract is within the Statute of Frauds and required to be in writing" (p. 202, citing 9 Gill, 205). The Court held that

"about 65 acres" means within a fraction of an acre or may cover a discrepancy of one or two acres, but that the appellee was not bound to accept a conveyance of 30 or 36 acres (204).

In Taney *v.* Bachtell, 9 Gill, 205, the Court said (211), "We are sometimes misled, by applying to one class of cases *dicta* to be met with in the books used in reference to a different class. This being a contract relative to land must be, every part of it, in writing, and cannot be valid if partly in writing, though the deficiency could be supplied, if verbal testimony was admissible." * * * "The policy of the law is to prevent fraud and perjury by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever." Otherwise the clause in the Statute of Frauds which relates to lands would be without meaning.

In Thomas *v.* Turvey, 1 Har. & G., 435, the Court held (438) that a deed for part of a tract of land, designating the quantity, but without any description of the part sold, was void, and that "the ambiguity on the face of the conveyance could not be explained by extrinsic circumstances" (439).

In Dorsey *v.* Wayman, 6 Gill, 59; 66, the Court held that the description of the land was too uncertain, because "the contract gives only the line adjoining the turnpike; what are the other courses and distances of the land sold cannot be known from the agreement itself or by anything referred to in it." The description was "all that part of a tract of land called Range Declined, lying adjoining the turnpike road near where Woodward now lives."

In Powers *v.* Rude, 14 Okl., 381, 79 Pac., 89, 94, 95, *held* that a contract which did not sufficiently disclose on its face or by reference to any other instrument the land that was to be conveyed, was clearly within the Statute of Frauds and therefore void.

In Williams *v.* Morris, 95 U. S., 444, the Court said that unless the essential terms of the sale can be ascertained from the writing itself or by reference in it to something else, the writing is not a compliance with the Statute, and if the agreement be thus defective it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the Statute was intended to prevent. In support of this the Court cites numerous authorities.

"No prior negotiations can be resorted to for the purpose of eking out a binding contract."

1 John. Ch., 273, 279–282, Parkhurst *v.* Van Cortlandt, cited in 3 App. D. C., 6.

In the light of the foregoing well-consideredd ecisions, the agreement would be wholly unenforceable and void except for the fact that it mentions the good will and license; thus indicating and referring to the bar-room business, and admitting the inference that about 60 feet by about 200 feet of the land used or required for use in that business was included in the agreement. The defendant's plea of set-off rests on the theory that parol evidence may be resorted to for the purpose of identifying or locating what is thus indicated and referred to in the written contract, and the plaintiff himself testified (R., 17), "The bar-room business and license is the principal thing that I was after."

But the plaintiff's theory, which was adopted by the Court at the beginning of the trial, was that he could allege a written contract calling for the entire tract, and then sustain his allegations with a written contract calling for only a part of the tract, and meet the objection of variance by parol testimony contradicting the terms of the written contract and tending to establish an oral agreement and understanding for the sale of the entire tract instead of the quantity designated in writing.

This opened the door to all the evils which the original

Statute of Frauds sought to exclude, and is contrary to well established rules concerning all written agreements.

The question in the construction of written instruments, is, not what was the intention of the parties, but what is the meaning of the words they have employed. Oral evidence cannot be resorted to "for the purpose of contradicting or varying the language actually employed."

110 Ill., App. 381, 386, Cameron *v.* Sexton.

This agreement was written by Richard, who was taken by the plaintiff to Harten's place for the purpose of writing it, and who prepared and wrote it on behalf of the plaintiff (R., 19, 23). Richard knew the dimensions of the entire tract (R., 23, 8), and his knowledge must be imputed to the plaintiff, who is thus estopped to assert the contrary.

If there be room for construction, it must be favorable to the defendant. "A party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him."

76 U. S., 9 Wall., 394, Noonan *v.* Bradley.

Where a written contract was prepared by the plaintiff and contained conflicting provisions, it should be construed most strongly in favor of the defendant.

84 S. W., 1041 (Ark.), Allen-West Commission Co. *v.* People's Bank.

A contract ambiguous in terms must be construed as unfavorably as its terms will admit against the party who proposed the contract and prepared it.

84 S. W., 491, 493 (Ark.), Leslie *v.* Bell.

The plaintiff testified that after he heard that Harten wanted to sell he sent Andrew Loffler out to negotiate with Harten (R., 11), and followed that up by taking Richard

out with him for the purpose of writing the agreement (R., 19, 23).

If it was then understood by the parties that the agreement was to cover the entire tract, the general term "my property" would have been used without stating dimensions. But instead, the draftsman, acting for Loffler, employed the definite article "the," so that, the descriptive call in the agreement may be read, "The property fronting on Brightwood Avenue about 60 feet with a depth of about 200 feet." These figures must be taken as a limitation upon the words, "the property," and these latter words could well be taken as referring only to the "saloon business" with the use of so much of the real estate as comes within the limitation. They could not be extended to include the title to the land except for the defendant's concurrence in such interpretation.

The agreement is on its face ambiguous. It does not mention "land," or "real estate," or "improvements." It contains none of the words apt or usual in reference to land.

Throughout the testimony the several witnesses used the expression "saloon property," in reference to the business alone, including license and good will, without intending the expression to include ownership of the land occupied in conducting the business. The plaintiff himself testified that he had previously bought "saloon properties" and knew their value, but his testimony as to such value excluded the real estate (R., 15, 16), and his contract with McCullough (R., 34) shows on its face that the "saloon property" then owned by him did not include title to any real estate. His expert witnesses, Messrs. Montague and Helwig, use the expressions "saloon properties" and "saloons" in the same sense, excluding title to land (R., 25, 26).

Under these circumstances it might have been contended

by the defendant, with great force, that it was in this sense the words, "the property," were employed in writing the agreement.

Without anything in the agreement to indicate that Harten owned any property, located on Brightwood Avenue and fronting thereon and near Battle-ground Cemetery, or to indicate of what "the property" consisted, a case of patent ambiguity is presented. But whether *ambiguitas patens* or *ambiguitas latens*, it is clearly one of those cases which can be helped only by election and not by averment. Lord Bacon, in his Maxims, stating what is the recognized basis of the law governing this subject, says, "Of these, infinite cases might be put; for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty. But if it be *ambiguitas latens*, then otherwise it is; as if I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all; but if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact, and, therefore, it shall be holpen by averment, whether of them was that the party intended should pass. So if I set forth my land by quantity, then it shall be supplied by election, and not averment. As if I grant ten acres of wood in Sale where I have 100 acres, whether I say it in my deed or no, that I grant out of my 100 acres, yet there shall be an election in the grantee, which ten he will take. And the reason is plain, for the presumption of the law is, where the thing is only nominated by quantity, that the parties had indifferent intentions which should be taken; and there being no cause to help the uncertainty by intention, it shall be holpen by election."

1 Best on Evid. (Morgan's Ed.), Sec. 226, pp. 425, 426.

Therefore (as the agreement is not divisible and if it be not wholly void for uncertainty), it would be for the plaintiff to elect what part of the defendant's tract he will take, were it not for the fact that in order to take the "good will, license and fixtures" included therein he must take the south 60 feet, which includes the bar-room and the driveway leading to the "Summer Garden" back of the bar-room.

Dealing with the agreement as a case of latent ambiguity so far only as concerns the location of the 60 by 200 feet, parol testimony was admissible only to remove that ambiguity. The defendant's theory, upon which his plea of set-off was based, admits such testimony, for that purpose only, so that the agreement itself and such parol testimony are consistent and harmonious with each other. This theory is in accordance with Okie *v.* Person, 23 App. D. C., 170, 181, and with the plaintiff's own testimony that the license and business was the principal thing he was after (R., 17).

Early in the trial, when the plaintiff commenced to put in parol testimony tending to show intention of the parties to include the entire tract, defendant's counsel objected, whereupon counsel for the plaintiff stated that the "testimony was to explain the contract and apply it to its proper subject matter" (R., 9), and the Court instructed the jury to the same effect (R., 54, top).

Parol evidence to identify the property described in a contract is inadmissible if inconsistent with what appears in the writing.

76 Ala., 204, 209, 210, Guilmartin *v.* Wood;
51 Ill., 198, 201, Hutton *v.* Arnett;
124 Mich., 120, 123; 82 N. W., 808, Lawrence *v.* Comstock;
1 How. (Miss.), 591, Carmichael *v.* Foley;
37 Mo. App., 43, 47, N. H. Cattle Co. *v.* Bilby;

19 N. H., 273, 278, Peaslee *v.* Gee;
16 Ohio St., 472, 477, 478, Johnson *v.* Pierce;
7 Ohio St., 99, 103, 106; 70 Am. Dec., 57, McAfferty *v.* Conover's lessee;
3 Brewst., 180, 188, 189, Messer *v.* Rhodes;
19 R. I., 25, 27; 31 Atl., 428, Coombs *v.* Patterson;
22 Wis., 167, 169, Curtis *v.* Supervisors;
181 Mass., 134, 135; 63 N. E., 409, Morton *v.* Clark;
23 N. Y. Supp., 880, 882; 4 Misc., 167, Morowski *v.* Rohrig;
And many other cases cited in 17 Cyc., 734, 748.

In 76 Ala., 209, *supra*, the Court held that parol evidence may be used to explain an ambiguity, but not to show a mistake in description. That is the precise point in the case at bar. And in 23 N. Y. Supp., 882, *supra*, the Court said, "the question of the admissibility of conversations preceding a written contract is not only a question of evidence, it is a question of contract."

Parol evidence of extrinsic circumstances, is received not for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed. The duty of the Court is to declare the meaning of what is written and not of what was intended to be written; keeping in view the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument.

17 Cyc., 673–675, citing—
35 Ala., 453, 462–469, Hughes *v.* Wilkinson.

The question as to the effect to be given the word "about" as employed in the agreement, is more fully considered under the VI Assignment of Error; but the foregoing authorities fully sustain the exceptions under the I Assignment of Error.

Even in Equity, "In the case of an executory agreement first to reform, and then to decree an execution of it, would be virtually to repeal the statute of frauds." This is the language of Baron Alderson, in Attorney General *v.* Sitwell, 1 Y. & C., 559, 582, 3, cited and followed in Osborn *v.* Phelps, 19 Conn., 63, 73, *supra.*

But in the case at bar the plaintiff is even more bold. He seeks, in a suit at law, to have a written agreement for the sale of land reformed by the aid of parol testimony and to obtain damages for an alleged breach previously committed. Anticipating such reformation by a jury, he declares upon an alleged contract in writing for the sale of the entire tract and alleges a breach thereof by the defendant. Then at the trial he fails to produce the contract alleged by him to have been made and broken, but in lieu thereof he produces a contract which the defendant has been ever ready, able and willing to perform and which calls for only a part of the tract. And thereupon the jury, under the guidance of the Court, constructively reform the written contract to make it conform to the plaintiff's views and mulct the defendant $1,250 as a reminder that by their verdict the Statute of Frauds has been repealed and that equity jurisdiction is being administered from the jury box.

II. TESTIMONY FOR PLAINTIFF AS TO AMOUNT OF BUSINESS.

The difference, if any, between $12,000 and the fair market value of the property included in the contract, at the time of the breach, was conceded by the parties and held by the Court to be the measure of damages (R., 56, 55, 57).

The plaintiff offered no proof of the value of the real estate, either separately or taken together with the license, fixtures and business, but was permitted to adduce, subject to exceptions, testimony tending to show that the business

alone was worth from $10,000 to $15,000 (Plff., R., 15; Montague, R., 25; Helwig, R., 26). All this testimony was elicited by hypothetical questions in which it was assumed, as a basis of calculation, that the daily receipts in the business were $75, and $125 on Saturdays; being $500 per week.

The only testimony adduced by the plaintiff tending to lay such a basis, was that of himself (R., 14) and his agent, Andrew Loffler (R., 21, 22), introduced subject to exceptions, to the effect that the defendant, before signing the agreement, had told him the amount of business he was doing there was "$75 a day and some Saturdays $125" (R., 14). This testimony was objected to as irrelevant and inadmissible.

But upon cross examination the plaintiff was asked, "Why didn't you make further inquiry as to the receipts of that business?" to which he replied, "Well, I said a while ago, I am familiar with the place out there, and I did not care anything about it because I knew just about what he did out there. I was pretty well acquainted. I knew as much about it as Harten did" (R., 18). It further appeared from the plaintiff's own testimony that the alleged statement as to receipts was voluntary on the part of the defendant. In reference to the receipts the plaintiff testified, "I did not ask him any questions at all" (R., 17).

Thereupon (R., 22) the defendant moved to strike out said testimony as to what the defendant said as to the receipts from the business, upon the ground that it appears by the plaintiff's own testimony that he did not rely and had no reason to rely thereon but had abundant opportunity to ascertain for himself.

Exceptions were duly noted (R., 14, 21, 22) to the action of the Court in admitting the testimony and denying the motion to strike it out.

The defendant testified that he never told the plaintiff anything to that effect or anything concerning the amount of the receipts (R., 39, middle), and also introduced a book kept by him showing the receipts to average, not $500 per week, but less than $150 per week (R., 47, 48), which, according to the testimony of the plaintiff himself, would prove that there was no value to the business (R., 18, top).

The book was the best evidence. If that were not so, the plaintiff's own testimony that he "knew as much about it as Harten did" (R., 18) would have qualified him to testify directly of his own knowledge as to the amount of the receipts; but he carefully avoided doing so.

Assuming that the defendant made such a statement, it appears by the plaintiff's own testimony to have been made casually, carelessly, gratuitously, and without affecting or being intended to affect pending negotiations. The plaintiff did not rely upon it; was not misled by it; but relied on his own knowledge and then failed to testify of his own knowledge.

Thus, having better evidence available, the plaintiff should not have been permitted to rely upon the alleged statement of the defendant or to let it go in evidence to the jury.

III. TESTIMONY AS TO SALE OF PLAINTIFF'S BUSINESS.

The plaintiff was allowed to testify that, relying upon his contract with the defendant, he sold out the saloon business he was then conducting in Georgetown, and that the same was profitable, and that he thus remained out of business for five months; to all which exceptions were duly noted (R., 14, 15).

It had no bearing upon the questions at issue and could have no effect except to prejudice the defendant in the

minds of the jury, and this error probably was not remedied by the fact, afterward established by the defendant, that the plaintiff's contract for the sale of his own place did not require him to give that up if he failed to secure the defendant's business (R., 34).

IV. PLAINTIFF'S TESTIMONY AS TO VALUE OF BUSINESS, ETC.

The plaintiff was allowed to testify, subject to exceptions, to the effect that defendant's business, leaving out the real estate, was worth between $10,000 and $11,000; also that the rental value of the defendant's property was $125 or $150 per month (R., 15, 16).

There is nothing in the testimony to show him competent as an expert, and his answers indicate that the figures given by him were based upon prices and rentals in the city, without further knowledge on his part than what he had acquired in purchasing, successively, three saloon properties for his own use.

V. TESTIMONY AS TO VALUE BASED ON HYPOTHETICAL PROCEEDS OF BUSINESS.

The plaintiff was allowed, subject to exceptions, to introduce testimony to prove a high rental value of the property and of the business (R., 25, 26). The purpose of this was to increase the *quantum* of damages. All this was elicited by questions based upon the hypothesis that the receipts of the business were $500 per week, but without competent evidence to sustain the hypothesis, as above shown in reference to the Second Assignment of Error.

VI. ADMISSION OF THE WRITTEN AGREEMENT IN EVIDENCE.

After parol testimony calculated to satisfy the jury that the defendant intended to sell all he had and leave the neighborhood, and stated by the plaintiff's attorney to be offered to prove such intention (R., 9), and after declaring upon an alleged written agreement for the entire tract, the plaintiff then offered in evidence a written agreement calling for only a portion of the tract. This did not support the allegations in the declaration and was objected to by the defendant on that ground. The exception then noted should be sustained (R., 12, 11). The admission of the paper as part of the plaintiff's case in chief was prejudicial error which was not remedied by the subsequent action of the defendant in putting the paper again in evidence in support of the plea of set-off.

As part of the plaintiff's case the paper was put in evidence upon the theory that the word "about," as used in reference to the dimensions stated in the agreement, tended to show that the figures therein stated were merely estimates and not to be considered as impairing the plaintiff's claim to the entire tract. In other words, that "about 60 feet" front meant 85 feet front, and that "about 200 feet" in depth meant the entire depth of 224 feet on one side and 239½ feet on the other side, and that instead of 6,000 square feet called for by the written agreement the entire 9,520 square feet were intended.

The word "about" (adverb) means nearly, approximately, with close correspondence in quality, manner, degree, quantity, number, etc.

Webster's Int. Dict.

In many cases, the use of this word in conveyances or contracts for land, has rendered such contracts and conveyances unenforceable for want of certainty.

In Finelite *v.* Sinnott, 5 N. Y. Supp., 439, 440, it was *held*, a deed of land being "about" 30 feet wide does not fix the dimensions with sufficient certainty to convey the property.

In Shipp *et al. v.* Miller's Heirs, 15 U. S., 2 Wheat., 316, 326, the entry was for 1,000 acres "on a spring branch about six miles a northeastwardly course from Stoner's Spring, to include a tree marked," etc. The distance to the branch and the tree was 4½ instead of 6 miles and the course not northeastwardly, and the entry was therefore held void for uncertainty.

In Johnson *v.* Pannell's Heirs, 15 U. S., 2 Wheat., 206, 211, the Court, per Marshall, C. J., stated that reasonable certainty has always been required of the general or descriptive call and also of the particular or locative call, and that "In ascertaining a place to be found by its distance from another place, the vague words 'about' or 'nearly' and the like, are to be discarded, if there are no other words rendering it necessary to retain them; and the distance stated is to be taken positively." To the same effect is Bodley *v.* Taylor, 9 U. S., 191, 225.

In the case at bar the word "about" is used in the "general or descriptive call," and under the foregoing decisions the word may be rejected, or else it must be taken as rendering the agreement too uncertain for enforcement, as in the cases in 54 Md., 187, 1 Har. & G., 435, 6 Gill., 59, and 102 Mass., 24, above cited in reference to the First Assignment of Error. The agreement was apparently intended as tentative, and left it open for the parties to locate the portion of the real estate intended to be conveyed with the business and describe the same in a subsequent writing. Failing to do so, neither can complain.

The parties are reciprocally bound by the agreement, if it is binding on either, and the rules by which the liability of the parties and each of them is to be tested should also

work reciprocally. As an illustration let us suppose that the entire tract was in fact only 60 by 200 feet and the agreement had called for "about" 85 by "about" 224 or more feet. In such case Harten could not require Loffler to complete the agreement, nor could he defeat a claim by Loffler either for the entire quantity stated in the agreement, or for abatement in the price. Hence, Loffler must be held by the agreement as it is written, not only by the force of the doctrine of mutuality but also by the principles declared in the following decisions:

54 Md., 187, 204, 39 Am. Rep. 374, *supra*;
23 Fed. Cas., 964, 968, Thomas *v.* Perry;
40 Ohio St., 341, Stevens *v.* McKnight.

In Thomas *v.* Perry, *supra*, the deed purported to convey "about 2,600 more or less." This was held to be a warranty of the quantity, and that a deficiency of 1,000 acres entitled the grantee to relief in equity.

In Stevens *v.* McKnight, *supra*, the contract called for "about" 140 acres. This was held to represent that the actual quantity was a near approximation to 140 acres, and a deficiency of $5\frac{23}{100}$ acres, valued at $55 per acre, was too great a variation.

A shortage of 23 feet in the depth of a city lot, described as "about" 4 rods front and 250 feet in depth, constituted such a substantial defect as will excuse performance on the part of the purchaser.

90 N. Y. S., 796, 98 App. Div., 474, Albro *v.* Gowland.

And in Lipscomb *v.* Watrous, 3 App. D. C., 1, 7, this Court has declared the "settled doctrine" as laid down in 10 Wall., 359, that when, from any cause, a "contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the

other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

The general well settled rule is as laid down in Bigham *v.* Madison, 103 Tenn., 358, 362, 47 L. R. A., 267, that a vendee of land, when it is sold in gross or with the description "more or less," or "about," does not thereby *ipso facto* take all risk of quantity, but the use of these or similar words in designating quantity, although they show a sale in gross, and not by the acre, covers only a reasonable excess or deficiency; citing the following cases:

14 N. Y., 143, 158, Belknap *v.* Sealey;
19 Ark., 102, 110, Harbell *v.* Hill;
61 Ark., 120, Drake *v.* Eubanks;
22 Fed. Cas., 1,192, Stebbins *v.* Eddy;
4 N. J. Eq., 212, 216, 217, Couse *v.* Boyles;
37 W. Va., 715, 720, 723, Pratt *v.* Bowman;
69 Tex., 293, Wheeler *v.* Boyd;
66 N. H., 136; 9 L. R. A., 50, Newton *v.* Tolles.

The word "about" gives a margin for a moderate excess in, or diminution of the quantity mentioned and imports that the actual quantity is a near approximation to that mentioned.

54 Md., 187, *supra;*
74 Mich., 416, 421, Sample *v.* Pickard;
40 Ohio St., 341, *supra;*
7 Ind. App., 462, 467, 468, Indianapolis Cabinet Co. *v.* Herrman.

VII. ADMISSION OF THE DEED IN EVIDENCE.

When the plaintiff offered in evidence the deed which the defendant had refused to execute, the latter objected thereto on the ground that the description of the property

therein did not correspond with the description in the agreement (R., 28, 29).

This objection should have been sustained. The deed called for the entire tract, appurtenances, etc. This would pass the title to part of the lane when it reverts to that tract (R., 42), and the agreement required a deed for only a part of the tract.

The defendant was justified in his refusal to execute the deed.

VIII.

While the plaintiff was on the stand, he testified that on the day the agreement was signed and after he reached Harten's place, he had very little to say there. He was thereupon asked, on cross-examination, "Can you recollect what you said, if anything, to Harten?" To which he replied, "I merely said I would like to get it a little less than that. What will go with that? He said, I will sell everything here except the stock, and you cannot have the stock for that money. I said, all right, let it go for that" (R., 16).

The defendant's motion to strike out what Harten said should have been sustained, because it was not responsive; and further, it was subject to the general objection and exception (R., 15) to all that line of testimony as to matters outside and contrary to the written agreement.

IX. EXCLUSION OF TESTIMONY OFFERED BY DEFENDANT.

(1, 3) Hood, a witness for the plaintiff, testified, subject to exception (R., 9, 10), that two weeks or a month before the agreement was signed, Harten told him he wanted to sell his property and business, "everything," for $12,000, and the plaintiff while on the stand was asked, "When you went out there and talked with Mr. Harten about buying

this place, did he tell you he expected to keep a portion of this property for himself?" to which the plaintiff replied, "No, sir" (R., 19). This and other testimony was introduced by the plaintiff, subject to exceptions, for the purpose of showing that Harten had no thought of reserving any of his property. To rebut this, the defendant offered testimony tending to prove that when he signed the agreement with Loffler he was negotiating with Brady on the basis of $12,000 for just what he claims, in his plea of set-off, to have sold to Loffler (R., 30, 35, 43); also, that his understanding with his wife provided for the reservation, from sale, of the northern portion of the tract (R., 38).

This was clearly as admissible as the testimony of Hood, who had no part in the negotiations between Harten and Loffler further than, as he says, to tell Loffler that Harten wanted to sell and then to tell Harten that Loffler was coming (R., 10). But he does not say he told Harten he had sent Loffler, and Harten testified that Hood never informed him that he had a customer; Loffler or any other customer (R., 39, 40).

(2) The plaintiff introduced the testimony of Mr. Montague as an expert in dealing with saloon properties and values (R., 25). Later he was called as a witness by the defendant and asked the value of the entire tract and business (excluding stock in trade), being all the plaintiff claims under the agreement; but his testimony was excluded.

(4) The plaintiff testified that when he was at Harten's the day the agreement was signed, but before Harten signed it, "We talked about buying the property" (R., 11). On cross-examination he was asked, "Can you recollect what you said, if anything, to Harten?" He replied, "I merely said I would like to get it a little less than that. What will go with that?" (R., 16.) Mr. Richard, a witness for the plaintiff, testified on cross-examination that he probably

thought, when he was writing the agreement, that it was intended to cover the whole tract, but that no particular words were used, if any, to indicate to Harten that the purpose was to describe the whole, or to call Harten's attention to the fact, if it was a fact, that Loffler was expecting to get it all (R., 23). Afterward, when the defendant was on the stand, he was asked by his attorney, concerning the same occasion, "If Mr. Loffler at that time understood that he was making the contract for the purchase of all the land, was anything said there to indicate that that was his intention?" (R., 40.) This was excluded.

(5) Testimony introduced by the plaintiff (R., 8, 9) and by the defendant (R., 39) established the fact that the bar-room business was conducted on the south 60 feet of the tract, which included also the south 20 feet of driveway leading to the Summer Garden. It was also established by the evidence that within two or three hours after signing the agreement, the defendant measured off the south 60 feet front of his tract to see what it would include (R., 44, 40, 36, 35). It included the driveway, bar-room, sitting room and hallway. Thereafter, while the defendant was on the stand he was asked by his attorney, "State whether or not, if you know, the south 60 feet that was measured off there carried back to a depth of 200 feet would be sufficient to carry on that bar-room business"; but the Court excluded the testimony so offered and refused to permit the defendant to answer the question (R., 40, 41).

This testimony was not only proper to rebut the plaintiff's case, but was also proper to sustain the defendant's plea of set-off; or else the written agreement was too uncertain to be used by either party as the basis of litigation. See points and authorities *supra*, in reference to I and VI, Assignments of Error.

X.

The defendant was entitled to each of the instructions requested by him (R., 51, 52).

The first was requested upon the theory that there was no competent evidence in the case to sustain a verdict against him. The plaintiff had failed to produce a written agreement such as he had alleged and such as the Statute required. The written agreement introduced by the plaintiff was a variance from the declaration, and he relied on parol testimony not only to make out his case but also to impeach the written agreement.

The second instruction was based upon the theory that the plaintiff had failed to make out a case and that the only question turned upon the plea of set off. The record sustains this contention. The value of the entire tract was only $4,380 (R., 31). The average receipts did not exceed $150 per week (R., 47, 48), and at that rate there was no value to the business, according to the plaintiff's testimony (R., 18). On this showing the defendant was entitled to a verdict against the plaintiff for $7,370.

The third and sixth instructions were based upon the theory that the only competent proof in the case, of any agreement between the parties, consisted of the written agreement, and that the intention of the parties must be found in the words therein employed.

The ninth instruction was supported by the evidence and rested on the theory that the defendant had a right to rely upon Richard's knowledge of the dimensions of the entire tract and to assume that Richard's question, "What is the size of this place?" referred to the part or place needed for carrying on the business and in which Richard was then sitting, and that under the circumstances stated in the instruction the defendant was fully justified in relying upon the agreement as written.

The tenth, eleventh and fourteenth instructions appear to counsel to be good law.

The fifteenth instruction is supported by all the authorities. The last sentence in it is based upon the uncontradicted proof and the plaintiff's own testimony that ~~it~~ the contract was prepared and written at the request of the plaintiff and that the words used were selected by his own agent for that purpose.

XI, XII.

The portions of the charge which are excepted to, including also the four instructions requested by the plaintiff, relate principally to the question as to the admissibility of parol testimony to eke out the plaintiff's case and the right of the jury to consider such testimony in lieu of the evidence required by the Statute; such parol testimony being inconsistent with the written contract and not explanatory of it, but offered solely as a substitute for so much of the written agreement as describes the dimensions of the parcel intended to be conveyed; all in violation of the Statute concerning contracts for the sale of land and of the well-established rules prohibiting the impairment of written contracts by parol testimony. As stated by the Court, "the several counts in the plaintiff's declaration are not founded upon fraud, but upon alleged breach of the written contract by the defendant" (R., 55).

The portions of the charge excepted to are indicated in the record by being enclosed in brackets, and the grounds of exception are stated at page 60. The main questions have been hereinbefore discussed in connection with Assignments of Error I and VI. To indicate more specifically the basis of objection to the several portions of the charge so excepted to, the following is added:

At p. 53 "The case, as you understand," etc. The error here consists in leaving the jury to determine, as matter of

Henry W. Hodgkins
Clerk.

IN THE

Court of Appeals, District of Columbia

HUGH HARTEN, *Appellant,*
vs.
ERNEST LOFFLER, *Appellee.*
} No. 1727.

BRIEF FOR APPELLEE.

LEON TOBRINER,
Attorney for Appellee.

PRESTON B. RAY,
Of Counsel.

IN THE

Court of Appeals, District of Columbia

HUGH HARTEN, *Appellant,*
vs.
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} No. 1727.

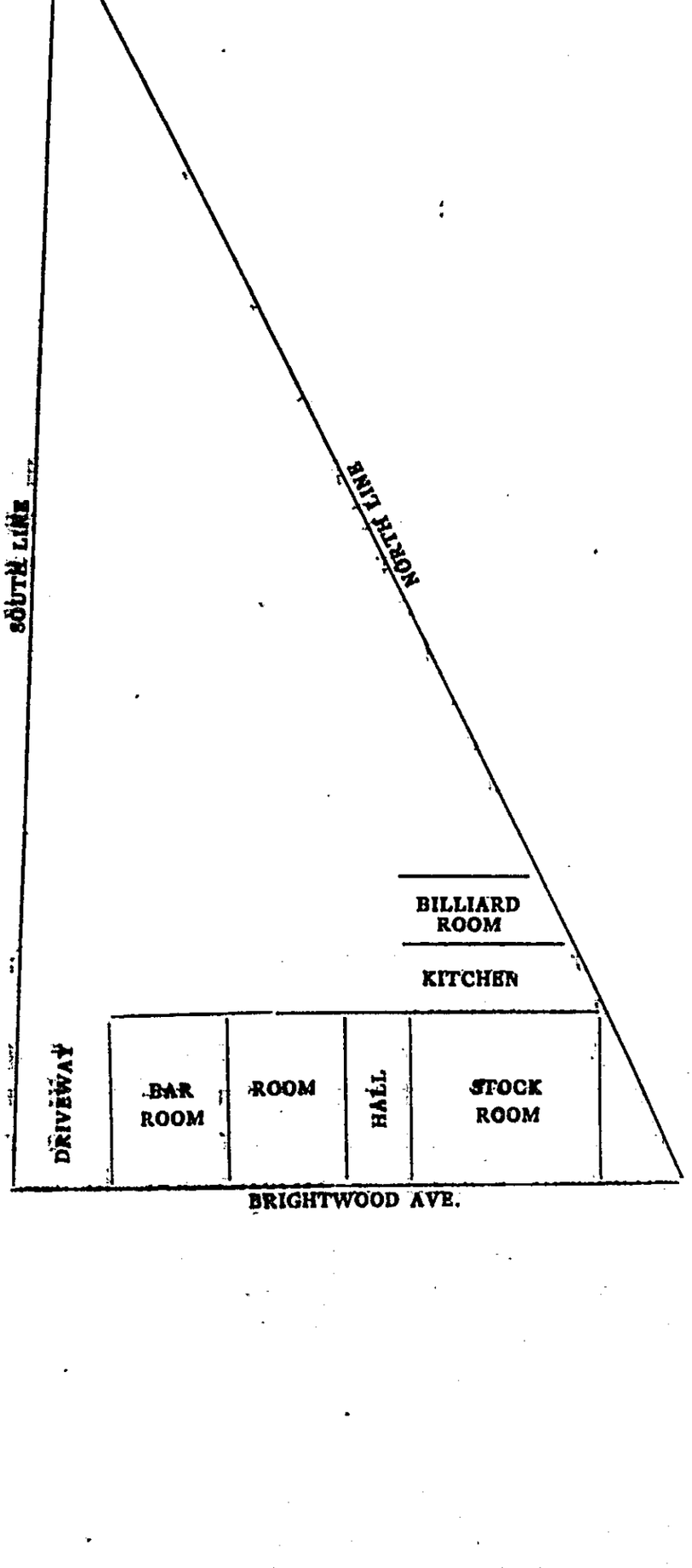
BRIEF FOR APPELLEE.

The bill of exceptions in this case is not in conformity with the rules of this Court, and contains matter totally immaterial, irrelevant and unnecessary to be inserted for the purpose of disposing of the questions of law, raised by the exceptions, and for these reasons was objected to when presented to the Court below.

For the reasons announced in Brown vs. Ins. Co., 21 D. C. 343, it should not be considered.

This is an action brought by the appellee against appellant for breach of contract.

For a number of years prior to 1905, the appellant was the owner of a plot of ground situate on Brightwood Avenue, or the Seventh Street Road, about a half mile north of the settlement known as Brightwood, in the District of Columbia, upon which he conducted a saloon and country tavern, or place of entertainment; the plot of ground was


SOUTH LINE
NORTH LINE
BILLIARD ROOM
KITCHEN
DRIVEWAY
BAR ROOM
ROOM
HALL
STOCK ROOM
BRIGHTWOOD AVE.

triangular in shape fronting on Seventh Street Road, eighty-five (85) feet; the south line of the triangle, which ran at right angles to the front line, had a depth of 224 feet, and the north line of the plot was of the length of two hundred and thirty-nine and fifty hundredths (239.50) feet; the plot contained in all nine thousand two hundred and fifty (9,250) feet; the improvements which fronted on the road consisted of a frame building fifty-one and a half (51½) feet wide, which practically occupied the centre of the front of the lot; at the northeast corner, and as part, of the triangle, was a small unimproved plot having a front of thirteen and a half (13½) feet, also triangular in shape, and on the south side was a strip twenty (20) feet wide, which was used as a driveway; at the south end of the building was a room used as a barroom; adjoining this a room used as a serving room to guests; adjoining the latter was a hallway, and adjoining this hallway in the northern portion of the house was a room arranged for, and used as, a storeroom for the surplus stock of liquors used in the conduct of the business; above this storeroom was a large room used in entertainments for guests, and known as the ballroom, the remaining upper portions of the house were used as quarters for the family of the appellant. Back of the storeroom, on the north line of the premises, was the kitchen, and back of that, also fronting on the north line, was a room used as a billiard or pool room for guests; in the rear of this billiard room, all fronting on the north line, were various sheds, stables and outhouses. The comparative location of these rooms is shown on the accompanying rough ground plan.

Measuring from the south line of the plot, sixty feet north on the front line, would bring the end of the line to a point in the doorway marked with a red cross in the pictures, which by stipulation, are made part of the record; by such measurement the south forty feet of the building only

would be included; the north 11½ feet would be excluded, as also the small triangular strip on the extreme north of the plot.

The evidence showed that the premises were occupied and used as one by the appellant.

Some weeks prior to the making of the contract sued upon, the appellant had called upon, and stated to one Charles D. Hood, who is engaged in the liquor business, that he desired to sell his property and business for twelve thousand dollars ($12,000.00) (R. 10); that he would not sell his business and rent his property; that he wished to get out of the neighborhood; that the people there harassed him, and he could not do business there; and that he had difficulty in renewing his annual license because of protests; and this information was communicated by Hood to the appellee. The appellee being desirous to purchase, thereupon sent his agent to negotiate with appellant for the purchase of the property; the agent called upon appellant, introduced himself as a real estate agent, who could obtain a purchaser for his "place," and asked him what he wanted for it (R. 19); the appellant informed him that he asked twelve thousand dollars ($12,000.00) for the property, fixtures and everything excepting the pool tables and stock; this the agent reported to appellee, and having subsequently advised appellant that he had a purchaser "for the place," he, with appellee, called upon appellant on the premises. On this occasion, which was two days before the making of the contract, appellant knowing that appellee was the prospective purchaser showed them over the premises (R. 11, 17, 20).

He took them over the whole building; showed them the different rooms he had and the location and condition of the premises; he took them into the barroom, and from the barroom into the sitting room which is in the portion of the premises designated as the old building; then into the store-

room which is designated as in the new part; then into the room above the storeroom used for dances; and into the kitchen which is back of the new part; then into the pool room which is back of the kitchen, and finally took them into the yard and left them there, after showing them the windmill.

On April 27, 1905, the appellee having concluded a sale of his saloon in Georgetown, notified appellant that he was coming out to his place to "make the deal" (R. 16), and having also notified his agent, the parties met upon the premises that same afternoon. There was some discussion respecting a decrease in the price, appellee desiring to pay a little less sum (R. 16). The price was finally agreed upon and an agreement suggested; Mr. Richards, a wholesale liquor dealer, a mutual friend of the parties, and who had been instrumental in the sale by appellee of his saloon, and had driven out with him, agreed to write the agreement.

Throughout all the negotiations nothing was said by appellant that he did not intend to sell the whole of his premises, or that he intended to reserve any portion; the only thing stated as being reserved, and not included in the sale, was the stock of liquors and the pool or billiard tables. It is plainly evident that the parties were negotiating in respect to the business, fixtures and realty as a whole.

In preparing the agreement, it appears that some difficulty was experienced as to a description of the real estate. Richard testified (R. 23), "I was there probably ten or fifteen minutes before I was asked to write the paper; I then wrote it; I drew up the paper based on my knowledge and ability just in this manner. So far as I can recollect I wrote about as far as 'license fixtures located on Brightwood Avenue near Battleground Cemetery,' and I turned then and asked *what is the size of this place;* there was a sort of general discussion that arose between Mr. Loffler, and Mr. Harten, and myself, and the other Mr. Loffler;

someone suggested it was about 60 feet; just who that was I am unable to say; I don't remember; we all assented to that, Mr. Harten agreed and said, 'that is about right,' and the figures were put in that way." The witness further testified that nothing was said by Harten or by Loffler to indicate that only a portion of the premises were to be sold, and it was supposed that the whole of the premises was covered by the description.

The appellee testified that, whilst they were discussing the front and depth of the property, so as to describe it in the agreement, appellant stated that it had about 60 feet front and about 200 feet depth (R. 12); that when Richards was writing the contract "he asked Mr. Harten how much ground is in this place. We all were guessing and Mr. Harten said put it down about 60 feet front and about 200 feet deep, and Mr. Richards said all right, we will put it down that way" (R. 18); that when the contract had been prepared and was to be signed by Mrs. Harten, Mr. Harten called her down and said to her, "I want you to sign this contract; *I sold the place*" (R. 13); that before the contract was prepared, and when they were discussing the price, appellant said to him, "I will sell everything here except the stock, and you cannot have the stock for that money." (R. 16.)

Andrew Loffler, the agent, testified that Richards agreed to write the paper; "when we came down to describe the place, Harten told him it was described in the license (R. 20); Harten brought the license in; the description in the license is 'opposite Battleground Cemetery,' Richards put that down and said we should describe the property a little plainer"; he said, 'What is the square number or what is the number of the lot'; Harten said 'there is no number to the lot;' he did not know the number of the square; so he said, 'we had better put down the number of feet *you* have here;' somebody asked me what my idea was and I

said about 60 feet; I walked and looked out of the window to size it up; Mr. Loffler made a guess; and we all made a guess; Harten said put down about 60 feet; we estimated about 60 feet front and about 200 feet deep" (R. 20-21).

Another witness, Peter J. May, testified that he met appellee and his wife at Harten's place; that Harten brought in Mrs. Loffler and introduced her to witness, and stated that Mr. Loffler had bought him out; that he had sold the whole place; everything, ground and all, and was going out of business (R. 24). That Mrs. Loffler asked witness if he had seen the house and upon witness saying that he had not, asked him to go through it, and witness and Mrs. Loffler were shown through the house by Harten and she laid out what she was going to do; how she was going to fix the house up. The evidence of the witness May had relation to the occurrences which took place on the day following the signing of the contract when appellee and his wife went out to the premises, so that his wife could inspect his purchase, and were shown over the whole of the premises by Mr. Harten (R. 13; 34, 25), being carried into the various rooms, including the storeroom, at the northeast corner, and ballroom over the same.

Subsequently the appellee proceeded to make application for the transfer of the liquor license in the premises, and for this purpose it became necessary that appellant endorse the license paper, as also sign the application for the transfer, and the appellee, or his agent and attorney called upon the appellant for that purpose on numerous occasions. Harten at first gave no reason for refusing to sign (R. 21); then he charged his refusal to his wife, saying he did not want family trouble (R. 21). When requested to sign by appellee and Mr. Ray, his attorney, and being charged with attempting to back out of his agreement, he replied: "I won't sign a damn thing" (R. 14, 21).

Subsequently appellee tendered to appellant the purchase money, and deed set forth in the record (29). Appellant did not read the deed (R. 28-42), but refused to sign. It was immediately after this interview that appellant offered the agent Loffler a bribe of $100 to "get me out of this" (R. 21). No question was made as to the amount of real estate to be conveyed until the question was raised by counsel for appellant, which was some time after appellant had refused to comply with his contract and repudiated it. (R. 49.) It will be observed that although the appellant's parcel of ground contained but 9,250 square feet he had entered into an agreement to sell a plot sixty (60) feet by two hundred (200) feet, containing twelve thousand (12,000) square feet of ground. The attention of the Court is especially called to so much of the cross-examination of appellant as appears on pages 43-45 of the record. And upon an examination of the whole record it must be apparent that the appellant, after considerable negotiation in which no reservation or limitation respecting the real estate to be sold, was mentioned or intimated, entered into agreement for the sale of his business and real estate, but that for reasons only known to himself he, within a short time thereafter, repented of his agreement and endeavored to escape compliance with his contract, using for that purpose any excuse or subterfuge which came into his mind, and finally claiming that by his contract to sell he was only required to convey a portion of the premises, and that the appellee was not entitled to so much of the premises as were covered by the best and main portion of the improvements embracing among others the store or stock room of the business, the ball room, kitchen, bath room and billiard room.

Here then was an agreement for the sale of real estate fronting "about 60 feet with a depth of about 200 feet" entered into by the parties under the circumstances detailed

in the record, and embracing apparently the sale of a tract containing 12,000 square feet of ground, when in fact the whole holdings of the vendor amounted to but 9,250 square feet, the agreement apparently relating to a rectangular piece of ground, when in fact the parties were dealing in respect to a piece triangular in shape. The agreement was for the purchase, as an entirety, of the "property, good will, license and fixtures," a sale in gross with no segregation as to the value of the several items that were embraced therein; the value of the real estate was enhanced by, and depended, according to the evidence, upon the franchise or license to carry on upon the premises the saloon and retail liquor business, and as appears from the evidence its value could not be ascertained by segregating or disconnecting it from the business which is attached to the premises.

The whole question, and issue, between the parties was, under what circumstances and in what sense they had used the word "about" in the agreement, and to what property the agreement applied.

Was the parol evidence, the admissibility of which is questioned by appellant in his first, sixth, eighth, tenth and twelfth assignments of error, admissible in the light of the facts and circumstances of this case?

At the outset it is asserted by appellant that the rule as to the admissibility of parol evidence, in relation to written contracts, is different so far as it is applied to a contract not within the Statute of Frauds, and one which is, by the Statute, required to be in writing, and sections twelve and fifteen of Reed on the Statute of Frauds are cited as an authority to sustain the proposition. Upon an examination, it will, however, be found that the same rule, as to the admissibility of evidence, applies to both classes of contracts; that the sections cited are only to the point, that in respect to contracts required by the statute to be in writing, a writing is

necessary to give them validity or make them enforceable, which the author adds is another reason why they should not be varied or contradicted by parol, and that oral evidence to supplement a manifestly imperfect writing (one which does not embody or contain all the requisites required by the Statute) is inadmissible. And finally, the author in concluding, at section 412 says,

> "that the contradiction between the different rulings which have been cited will, upon close examination, be found to be not so great as it seems; a description which in one case would point to nothing definite, would in another identify the property admitted by the parties, or known to the Court to be that in controversy, *while collateral evidence of the circumstances surrounding the transaction or of the position or doings of the parties, might cause a most general description to attach immediately to the precise property.*"

And so it is said in Browne on the Statute of Frauds at section 409 in discussing the admission of parol evidence to affect written contracts:

> "For most purposes it may be said that the Statute has neither added to nor taken from the stringency of these rules. At common law, such evidence is not admissible to contradict or vary the written agreement by showing what passed before or at the time of its execution between the parties. * * * And this is so *a fortiori* in relation to any contract which the statute required to be put in writing. On the other hand, parol evidence is admitted at common law to show the circumstances under which the parties have executed the written agreement with a view to fix its application to the subject matter which they had in their

> minds. And for this purpose, as we have seen in various places of the present chapter, it is equally admissible, though the agreement be one which can not, consistent with the statute, be made with writing."

The agreement between the parties was written and prepared, under the circumstances detailed in the evidence, by a person not versed in, or used to, such matters, and without legal assistance. In applying it, an uncertainty arose as to what was the intention of the parties, the property it applied to, and as to its meaning.

The object of the parol evidence was to place before the Court the situation of the parties, and all surrounding circumstances at the time the negotiations took place, and the agreement was entered into, for the purpose of ascertaining the intention of the parties and effectuating such intention.

For the purpose of interpreting the agreement, parol evidence was admissible to ascertain and make plain,

I. The sense in which the parties used the word "about".

II. The identity of the subject matter of the agreement and apply the contract to it.

III. The intention of the parties to the agreement.

I. "About."

The sense in which the parties used the word *"about"* is to be ascertained in the light of the circumstances surrounding the parties when the agreement was made. Upon investigation this will be found the rule upon which the courts proceeded in the cases cited by appellant on the interpretation to be given to the word.

It is a relative term of uncertain meaning. Says the Court in Pine River Logging Co. vs. U. S., 186 U. S., 279, 288:

"There is no doubt whatever of the general proposition that where the words 'about' or 'more or less' are used as estimates of an otherwise designated quantity, and the object of the parties is the sale or purchase of a particular lot, as a pile of wood or coal, or the cargo of a particular ship, *or a certain parcel of land,* the words 'more or less,' used in connection with the estimated quantity, *are susceptible of a broad construction,* and the contract would be interpreted as applying to the particular lot or parcel, provided it be sufficiently otherwise identified."

The word "about" is construed with reference to the subject matter and circumstances with regard to which it is used; it has a more uncertain meaning than "almost," "nearly," and etc.

Von Lingen vs. Davidson, 1 Fed. Rep., 178, 186 (Dist. Court).

"About" is a relative term. It may indicate one thing when applied to one state of facts, *and another under different circumstances.* Contracts, when their meaning is not clear, are to be construed *in the light of the circumstances surrounding the parties when they were made and the practical interpretations which they, by their conduct, have given the provisions in controversy.*

Von Lingen vs. Davidson, 4 Fed Rep., 346, 350 Circuit Court).
Lowber vs. Bangs, 2 Wall., 728, 737.

"Parol evidence is not admissible to vary the terms of a written instrument, but when an ambiguity exists it may be given in aid of interpretation *to show the facts and circumstances in the midst of which the parties were acting.*"

"These assumptions and calculations are facts in the light of which this *indefinite* word is to be read."

Von Lingen vs. Davidson, 4 Fed. Rep., 350, 351.

In Indianapolis Cabinet Co. vs. Herrman, 7 Ind. App., 462, 467, cited in appellant's brief on page 28, the court says:

"When the language is uncertain or ambiguous it is proper for the court in construing the contract and the rights of the parties thereunder, to consider the situation of the parties at the time of the execution of the paper and their subsequent conduct, as giving a practical construction to it."

II AND III.

The rule that parol evidence is admissible in aid of a written contract for the purpose of applying it to its subject matter, or to explain its terms, or the intention of the parties if of doubtful import, is too well settled to require extended citations. The following excerpts are, however, given as being peculiarly applicable to the case at bar, and as demonstrating in what manner the rule has been applied.

In Mead vs. Barker, 115 Mass. 413, the contract was dated "Boston" for the sale of "a house on Church Street"; the plaintiff was permitted to show by parol that defendant had no house in Boston, but had one on Church Street in Somerville, and that the bargain was made between the parties on the premises. Says the Court at page 415:

"When all the circumstances of possession, ownership, and situation of the parties, and of their relation to each other and the property, as they were when the negotiations took place and the writing was made are

> disclosed, if the meaning and application of the writing read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement."

Every valid contract must contain a description of the subject matter, but it is not necessary that it should be so described as to admit of no doubt what it is; for the identity of the actual thing and the thing described may be shown by extrinsic evidence.

Fry Specific Perf. Sec 325, page 157, 3d Ed.

To the same effect is Hurley vs. Brown, 98 Mass 545, in which the agreement was for a sale of "a house and lot of land situated on Amity Street"—there the plaintiff was permitted to show by parol that there was one only, of several, which the defendant had any right to convey, and that the parties had been in treaty for the sale and purchase of it, the court saying, 547-8:

> "We think that the presumption is strong that a description which actually corresponds with an estate owned by the contracting party is intended to apply to that particular estate, although couched in such general terms as to agree equally well with another estate which he does not own. * * * In a deed, the words of description are, of course, intended to relate to an estate owned by the grantor. And in our opinion this is also the presumption in construing a contract for a future conveyance. If the party who enters into the agreement in fact owns a parcel answering the description, and only one such, that must be regarded as the one to which the description refers. With the aid of this presumption the words "*a* house and lot"' on a

> street, where the party who uses the language owns only one estate, are as definite and precise as the words "*my* house and lot" would be; a description the sufficiency of which has been placed beyond all doubt by very numerous authorities." * * * We regard the fair construction of the words to be, that they relate to a house and lot owned at the time the memorandum was signed by the parties who subscribed it."
>
> See also Slater vs. Smith, 117 Mass. 96, 98.

In Farmer vs. Bates, 83 N. Car. 387, the contract was for the sale of "one tract of land containing 193 acres more or less, it being the interest in two shares, adjoining the lands of James Barnes, Eli Robbins *and others.*" The court after a full resumé of all the authorities held that parol evidence was admissible to identify the subject matter of the contract, saying (302):

> "We feel disposed to uphold contracts, entered into, drawn often by persons unaided by a legal adviser and not careful and precise in the use of language when there is a reasonably sufficient description of its subject, and to give effect to what was intended but is not very clearly expressed."

In Waldron vs. Jacob, 5 Ir. Rep. Eq. 131, L. R. 5 Eq. 131, the vendor wrote to her solicitor:

> "I have closed with Mr. Waldron for this place."

Parol evidence was admitted to show what was meant by "this place."

In Fulton vs. Robinson, 55 Tex. 401, 404, the real estate was described as "a certain tract of land, being my own headright lying on Rush Creek, in the cross timbers," the contract was held sufficient.

"Wherever there is a doubt as to the extent of the subject devised by will, or demised, or sold, it is a matter of extrinsic evidence to show what is included under the description, as parcel of it. Accordingly, in 1 Term. Rep. 701, Buller, Judge, said, whether parcel or not, of the thing demised, is always matter of evidence. So where a grantor in a deed described the premises as the farm on which he then dwelt, this was held to be a latent ambiguity, which might be explained by evidence *aliunde;* and evidence was admitted, that a particular piece of land, claimed under the deed, was at the time of the grant in a state of nature, uninclosed, and separate from the rest of the farm, and that the grantor remained in possession and occupied it as his own till his death—to show that it was not within the grant." 4 Days Rep. 265. "Without attempting to do what others have said that they were unable to accomplish; that is, to reconcile all the decisions on the subject, we think that we may lay down this principle as the just result. That in giving effect to a written contract, by applying it to its proper subject matter, *extrinsic evidence may be admitted to prove the circumstances under which it was made;* whenever, without the aid of such evidence, such application could not be made in the particular case."

Bradley vs. Steam Packet Co. 13 Pet. 89, 97, 99.

In its opinion in this case the Court further says "that it is a cardinal rule in the construction of all contracts that the intention of the parties is to be inquired into, and if not forbidden by law, is to be effectuated."

In Atkinson vs. Cummins, 9 How. 479, the Court says at page 486:

"The general rule is well stated by Tindal, Chief Justice, in the case of Miller vs. Travers, 8 Bingh. 244, that 'in all cases where a difficulty arises in applying the words of a will or deed to the subject matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate *or subject matter really intended to be granted or devised.*'"

The same rule is announced by this Court in Whelan vs. McCullough, 4 App. D. C. 58, 63:

"It is a well settled principle in the law of evidence that parol evidence may be received in aid of written evidence, in order either to establish a particular document, *or to apply it to its proper subject matter, or to explain it if its terms be of doubtful import;* or to rebut some presumption which affects it. Light is generally thrown upon these questions by proof *of the circumstances surrounding the parties and with reference to which the written document was made.*"

Okie vs. Person, 23 App. D. C., 170, 182.

In Reed vs. Proprietors of Locks, etc., 8 How. 274, where the court had instructed the jury that if, from the evidence, the parties to the deed *intended to include* therein the demanded premises, they should return their verdict for the tenants, the Court said:

"It can not be doubted, that, where a deed is indefinite, uncertain, or ambiguous in the description of the boundaries of the land conveyed, the construction given by the parties themselves, as shown by their acts and

> and admissions, is deemed to be the true one, unless the contrary be clearly shown. The difficulty in the application of the descriptive portion of a deed to external objects, usually arises from what is called a latent ambiguity, which has its origin in parol testimony, and must necessarily be solved in the same way. *It therefore becomes a question to be decided by a jury, what was the intention of the parties to the deed.*"

If evidence of this character is admissible for the purpose of ascertaining the intention of parties *to a deed,* it, consequently, is admissible in ascertaining the intention of the parties to *a simple contract.*

The authorities are collated in 17 Cyc. at pages 668-675, and the decisions are summed up as follows:

> "The parol evidence which can be admitted to explain the contract must be such as tends to show the correct interpretation of the language used, and its only purpose is to enable the court or jury to understand what the language really means."
>
> "Where the meaning of the parties is uncertain from the words used, and it is not within the power of the court to ascertain any other meaning by reference to the body of the instrument, evidence of the acts of the parties contemporaneous to and immediately prior to the execution of the instrument may properly be considered. The subsequent conduct of the parties acting under the contract, the meaning of which is doubtful, is also admissible to aid in the construction of the instrument and in determining the question of intent."
>
> "A deed or other writing should be construed with reference to the actual state of the subject matter at the time of its execution and for that purpose extrinsic evidence may be admitted to place the court or jury in

the position of the parties at the time of executing the instrument and thus enable them to intelligently interpret the language used."

"The conversations and statements of the parties at the time of or just previous to the execution of the contract between them may be admissible for the purpose of aiding in the construction of the writing—conversations between and statements of the parties to a written contract after its execution have also been held admissible to explain ambiguity in the writing."

"Parol evidence is admissible to show the situation of the parties and the circumstances under which the written instrument was executed for the purpose of ascertaining the intention of the parties and properly construing the writing. In other words, the court may by admitting any evidence of the extrinsic circumstances under which the writing was made, place itself in the situation of the party who made it, and so judge of the meaning of the words and of the correct application of the language to the thing described. Such evidence is received not for the purpose of importing in the writing an intention not expressed therein, *but simply with a view of elucidating the meaning of the words employed.*"

In respect to the rule in cases of patent and latent ambiguities the result of the authorities is stated in 17 Cyc. at page 682 to be:

> "The true rule with regard to patent ambiguities must be taken to be this: The patent ambiguity which can not be explained by parol evidence is that which remains uncertain after the court has received evidence of the surrounding circumstances and collateral facts which are of such a nature as to throw light upon the

intention of the parties. In other words and more generally speaking if the court, after placing itself in the situation in which the parties stood at the time of executing the instrument, and with full understanding of the force and import of the words, can not definitely ascertain the meaning and intention of the parties from the language of the instrument thus illustrated, it is a case of incurable and hopeless uncertainty and the instrument is so far inoperative and void; and it can not be sustained or rendered operative by the introduction of evidence which would necessarily have the effect of adding new terms to the writing.

"Where any doubt arises as to the true sense and meaning of the words themselves, or any difficulty as to their application to the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. In this case parol evidence is admissible *ex necessitate.*"

It is also contended for appellant that the receipt given by him is not sufficient under the Statute of Frauds:

> "No special form is needed; any writing properly executed of however crude a character is enough. Anything, Lord Ellenborough said, was sufficient that was 'under the hand of the party expressing that he had entered into the agreement' set out therein."
>
> 1 Reed St. Frds. Sec. 324.

The memorandum required by the Statute *is not the contract, but only the evidence of it,* and a memorandum properly signed of a by-gone contract is sufficient.

Reed St. Frauds Sec. 325.
Bluck vs. Gompertz, 7 Exch. Reps. 860, 868.
Mizell vs. Burnett, 4 Jones Law (N. Car.) 247, 254.

"Any note or memorandum in writing which furnishes evidence of a complete and practicable agreement is sufficient under the Statute, and parol evidence is admissible to explain latent ambiguities and to apply the instrument to the subject matter."

Williams vs. Morris, 65 U. S. 444, 456.
Barry vs. Coombe, 1 Pet. 640.

In the case in 1 Pet. the Court as far back as 1828 held that a memorandum in a statement of account as follows: "by my purchase of your ½ E. B. wharf and premises, this day, as agreed between us $7,578.63" and signed by the party to be charged, was a sufficient compliance with the statute so as to make the contract enforceable.

Nor is there any variance between the contract declared on and the contract offered in evidence.

Upon an examination of the three counts in the declaration, it will be seen that the contract or agreement was admissible in evidence under any of them, and being so admissible, the parol evidence was admissible to interpret and explain any uncertainty respecting the intention of the parties.

In Warfield vs. Booth, 33 Md. 63, the defendant agreed to sell to the plaintiff "his good will of practice for the sum of $1,000." It was contended that the contract varied from the contract set out in the declaration, because the latter purported to be limited in its terms to the town or neighborhood of Lisbon, whilst the written article was general and unrestrictive. The Court held that the question of variance

depended upon the construction of the contract; that the sale, by the defendant, of his "good will of practice" would extend no further that his practice as a physician and surgeon had extended, and that it what he agreed to relinquish in favor of the plaintiff. That it was competent to prove by parol evidence that the contracting parties were physicians so as to make intelligent the terms "good will of practice" in the contract, and to show what trade or profession was meant, and to prove tha the practice of the defendant had been confined to the village of Lisbon and its neighborhood, so as to show the subject matter to which the contract referred.

Continuing the Court said:

> "For such purpose parol evidence is alway admissible. Its office is not to alter or contradict the writing, but to apply it to the subject matter, in order that it may be executed according to the intent of the parties. It is a familiar rule that "where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms." 1 Greenl. Ev. Sec. 282. The rule is thus correctely stated by Isham J., in Noyes vs. Canfield, 27 Vt. 79 (85): "Whenever an ambiguity arises from extrinsic matters, or when from the language used the object or extent of the contract can not be determined, parol testimony is admissible to remove the ambiguity, or to ascertain the object upon which the contract was designed to operate. *It is a mere rule of interpretation to find out the meaning of the written words as the parties used them.*"

AS TO APPELLANT'S SECOND ASSIGNMENT OF ERROR.

The measure of damages given by the Court was in the language of appellant's fourth prayer.

Both appellee and Andrew Loffler testified that in the preliminary negotiations appellant represented that the receipts from his business amounted to $75.00 a day and some Saturdays $125.00, (R. 14, 22) : true it is that this was denied by appellant, this, however, only raised a question of veracity; that they were voluntarily made by appellant is immaterial; whether they were made by him for the purpose of influencing the appellee to purchase was a question for the jury, but under all circumstances if they were in fact made it was an admission by appellant respecting an element which could be taken into consideration in fixing the market value of the business and in respect to which no one was better informed than appellant. Appellant's objection and motion to strike out this evidence was upon the ground that appellee did not rely upon the statement; the plaintiff's suit was not because of fraudulent representations as to the value of the business. Appellant's argument under this assignment is one which should have been addressed to the jury, but it does appear (R. 46) that appellant himself testified that the real estate and business were worth $16,000.

The evidence covered by the third assignment of error was not prejudicial to appellant.

For the purpose of showing his good faith in the transaction appellee testified that he sold out his own saloon, so that he could carry out his agreement with appellant and remained out of business some five months. This evidence was not made the basis of any claim for damages, the measure of damages being limited by the prayers and charge of the Court to the difference between the purchase price and market value.

AS TO THE FOURTH AND FIFTH ASSIGNMENTS OF ERROR.

There was no error in admitting the evidence referred to in these assignments; the appellee testified that he had been in the retail liquor and saloon business for some seventeen years; that he had bought and sold several saloon businesses during that period; that some years prior to this purchase he had owned a saloon in the neighborhood of the Harten property, and at the time he made the purchase was engaged in the retail liquor and saloon business; it was perfectly competent for him to testify, under all the circumstances, what was the market value of the business, and it having been proved on the part of the appellee that appellant had made certain representations as to the proceeds derived from the business, it was among other things, competent on the part of the appellee to show by the witnesses, Montague and Helwig, who were engaged in the business of buying and selling saloons and properties connected therewith, and used for that purpose, what was the market value of the property in question upon that basis or upon any other basis which was properly in evidence. It will be remembered that subsequently the defendant introduced the testimony of these same witnesses and others for the purpose of showing a less value of the property based upon lower receipts.

In this connection we again remind the Court that the purchase was of the business, license, good will and real estate as an entirety, and in fixing upon the market value of the property as a whole, it was perfectly competent and proper that the value of all the items, one being dependent upon the other, should be presented to the jury for the purpose of ascertaining the value of the whole.

AS TO THE SEVENTH ASSIGNMENT OF ERROR.

The deed was offered in evidence for the purpose of showing a tender to the appellant and the willingness of the appellee to perform his part of the purchase. There is nothing

in the record except the assertion of the appellant to prove that he had any right, title or interest to the lane referred to in the assignment of error, or that a conveyance of his real estate would have carried any title or interest in and to the lane or that the lane would revert under certain conditions.

The deed contains only an accurate description of the property in respect to which the parties were dealing, and which the appellant had agreed to sell to the appellee.

As to the Ninth Assignment of Error.

Appellant's offer to prove by the witnesses, Brady, R. 30, Brian, R. 35, by himself, R. 43, and by his wife, R. 38, that at the time appellant signed the contract with Loffler he had negotiations to sell only a portion of the property to others was properly excluded; the offer was not to show that appellee was aware or had been advised of such negotiations or the subject matter of them; nor could such negotiations shed any light, or in any manner explain the negotiations or agreement had and entered into between the appellant and appellee.

(1, 3). The testimony of Hood, R. 10, which had been admitted in evidence as to statements made by Harten to witness that his business and property were for sale and that he desired to sell the whole of it and get out of the neighborhood shows that these were all communicated by Hood to Loffler, and originated the negotiations which finally resulted in the sale.

(2) As to the exclusion of the question propounded to the witness Montague, R. 32: The witness had not qualified as an expert on the value of real estate, but was simply a broker engaged in the sale of saloon and liquor establishments; he was asked, assuming that "the receipts from Harten's business amounted to $150 to $200 a week; that the real estate was worth in the neighborhood of four thousand

dollars; that the improvements—the land, buildings on it, the entire tract as described in the testimony here—*what would be a fair price to pay for that land with the buildings on it and the improvements,* and fixtures and the liquor license and good will of the business, not including the stock in trade"?

No argument is advanced here that it was error to exclude the question, but it is apparent in the first instance that the assumption of four thousand dollars as the value of the real estate was an assumption independent of the character of the business which was carried on upon the premises and to which the franchise had attached; the question was therefore based upon an arbitrary assumption not addressed to the market value, but what would be "a fair price"; in addition to this witness had not qualified as an expert on the value of the real estate, and under all circumstances the exclusion of the evidence worked no prejudice to the appellant.

(4) The appellee in his testimony in chief had testified respecting all the negotiations and transactions between him and appellant prior to and at the time of the signing of the agreement; this covered all the representations and conduct of the appellant. On cross-examination he had testified that at the time the agreement was signed he had very little to say and was asked what he said, if anything, to Harten, and replied, "I merely said I would like to get it a little less than that; what will go with that?"; to which Harten replied, "I will sell everything here except the stock and you can not have the stock for that money"; to which the appellee answered, "All right, let it go for that."

All the parties present at the time of the negotiations had testified as to what was actually said by appellant and appellee, as well as themselves, concerning the negotiation; the question, the exclusion of which is complained of, was an argumentative one, calling for a conclusion of the ap-

pellant as to the appellee's understanding that he was making a contract for the purchase of all the land and, consequently, was properly excluded.

(5) Whether the south 60 feet by the depth of 200 feet "would be sufficient to carry on that bar-room business" was not in issue between the parties; the question was what had the appellant agreed to sell to the appellee; on the same theory, evidence that one-fourth of the property was sufficient for the purposes of the business would have been admissible.

AS TO THE 10TH ASSIGNMENT OF ERROR.

The correctness of the appellant's first prayer is already covered by our reply to the first assignment of error.

Appellant's second prayer erroneously submitted to the jury the question of how much ground was necessary "for the convenient operation of appellant's business," but the refusal worked no injury to the appellant, inasmuch as the jury by its verdict found that the parties had contracted with respect to the whole property.

The third prayer was faulty because it submitted to the jury only the appellant's intention as to what the contract was intended to include, and that prayer, together with the 6th and 9th, were practically covered by the Court in its instruction to the jury as to the intent of both parties and the interpretation of the contract in the light of such intent as found in the evidence.

> Where the effect of a contract is in controversy the understanding which one party has of it as to its meaning or purport, is not evidence in his own favor and against the other party to whom such understanding was not communicated. 17 Cyc., 675.

AS TO THE 11TH AND 12TH ASSIGNMENTS OF ERROR, COVERING THE CHARGE OF THE COURT TO THE JURY.

We submit that, under the authorities we have submitted, the charge of the Court was correct in all details.

The authorities cited on pages 13 and 14 of appellant's brief were generally cases in which specific performance was the relief sought, and in which the courts have unanimously held that inasmuch as this remedy is in the discretion of the court, the contract to be enforced must be clear and explicit, and the property in respect to which the contract is sought to be enforced must be fully and clearly described in the instrument so that the court may execute it by its decree.

Appellant on page 16 of his brief makes the point that the agreement was written by Richard "who was taken by the plaintiff to Harten's place for the purpose of writing it and who prepared and wrote it on behalf of the plaintiff." The record does not disclose such to be the fact. It appears from Richard's testimony (R. 22), that he had been instrumental in assisting the appellee to dispose of his business and drove with him to appellant's establishment; that both parties were customers who purchased their supplies of liquor from him. Richard says: "I was asked by the two parties to draw up an agreement which both of them could sign." Richard was not a lawyer or scrivener; he was simply a wholesale dealer in liquor who was interested in seeing the "deal" put through, being a creditor of Harten. True it is that about 1898 he had bought in the property at a trustee's sale, and assigned his purchase to Harten, and that since then Harten had executed a deed of trust to secure his firm, but at the time of writing the agreement in question he did not remember the metes and bounds of the property (R. 23).

The agreement was suggested by all parties; it had not been first prepared and taken to Harten's establishment for signature; after the parties had agreed upon their terms an agreement was suggested and the agreement in controversy was the result. Noonan vs. Bradley, 9 Wall., 394, and the authorities cited on page 16 in support of the proposition there made are not applicable to the case at bar.

Continuing, however, the quotations of the case in 9 Wall., the Court says:

> "And on the further ground that when an instrument is susceptible of two constructions—the one working injustice, and the other consistent with the rights of the case—that one should be favored which standeth with the right."

Replying to the authorities cited on pages 19 and 20 of appellant's brief on the question of the admissibility of parol evidence it is conceded that such evidence is inadmissible "if inconsistent with what appears in the writing." The proposition here is, that the word "about," as used by the parties, must first be construed, and for the purposes of that construction parol evidence was admissible. The cases cited by appellant under this proposition were all cases where the language of the writing was clear and no ambiguity or uncertainty existed, and consequently parol evidence could not be admitted to contradict, vary, or alter the written instrument. As an example:

> In Guilmartin vs. Wood, 76 Ala., 204, cited by appellant, page 19, the description was by clear and definite metes and bounds. It was attempted in ejectment to show by parol that one of the lines was incorrectly stated in the deed as being on the "west" side of a street instead of the "east"; plainly the evidence was inadmissible.

So in Hutton vs. Arnett, 51 Ill., 198, and Lawrence vs. Connstock, 124 Mich., 120, the property (personalty) was fully described and no ambiguity existed, and so with the other cases cited which were attempts to contradict or vary, by parol, the contents of written instruments containing no ambiguities and plainly expressing the intention of the parties.

In Land Society vs. Smith, 54 Md., 187, also cited by appellant, the contract was for the sale of a tract containing "about 65 acres." The purpose of the parol evidence offered in that case was to prove a sale of 65 acres *without qualifying words,* and also to prove representations by the agent of the vendor that the tract contained *at least* 65 *acres,* and that such representations induced the appellee to enter into the contract. This evidence, it is conceded, was inadmissible and was properly held so by the Court. The case is also quoted by appellant as an authority upon the construction to be given the word "about." We submit, however, that the rule as announced in Logging Company vs. U. S., 186 U. S. 279,288 is authoritative and binding. In the Maryland case, the interpretation to be given to the word was considered for the purpose of ascertaining whether the quantity of land did or did not enter into the essence of the agreement under consideration; that this was the only purpose that the court had, is apparent from an examination of the opinion at page 203, where the court discusses the rule respecting quantity as an essence of the contract, and in such discussion, and for the purpose of ascertaining whether such was the intent of the parties, says at page 304:

"But what is the force and effect of the qualifying words 'about 65 acres' in this contract? Does it import that quantity was not a material part of the contract; and can the court so declare as a conclusion of law"?

And following that proposition the court concludes that by reason of the qualifying words quantity was an essence of the contract. So that the word as then considered was interpreted simply for the purpose of the one question.

It is submitted that the issue between the parties was fairly presented to the jury by the Court in its charge; that there was no error in the record, and that the judgment should be affirmed.

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